PP

v.

JOHNNY JAMUYAH & ANOTHER APPEAL

HIGH COURT SABAH & SARAWAK, SANDAKAN
LEE HENG CHEONG JC
[CRIMINAL APPEALS NO: BKI-42-8/1-2012 &
BKI-42-9/1-2012]
31 JULY 2012

CRIMINAL PROCEDURE: *Prosecution - Conduct of - Omission and/or failure to produce chemist report - Effect - Whether omission and/or failure fatal to prosecution's case - Whether could give rise to adverse presumption - Evidence Act 1950, s. 114(g)*

CRIMINAL PROCEDURE: *Sentence - Rape - Appeal against conviction and sentence - Sentence of eight years imprisonment and one stroke of rotan - Adequacy of sentence - Whether sentence imposed manifestly excessive - Whether mitigating factors considered adequately before sentencing - Principles in sentencing - Penal Code, s. 376(1)*

EVIDENCE: *Corroboration - Sexual offence - Complainant's evidence uncorroborated - Whether credible - Nature of corroborative evidence - Admissibility - Whether conviction safe*

This was an appeal by the accused against the decision of the Sessions Court judge ('SCJ') imposing an imprisonment term of eight years and one stroke of the rotan for an offence of committing rape under s. 376(1) of the Penal Code. At the end of the prosecution's case, the accused was called to enter his defence where he counted himself as the only witness. The learned SCJ found that the prosecution had proven its case beyond reasonable doubt and found the accused guilty as charged and sentenced him accordingly. The accused appealed against the conviction and sentence, submitting, *inter alia,* that (i) the conviction was not safe as there was no corroborative evidence of the complainant's evidence; (ii) the prosecution failed to produce the chemist report of the two swabs suspected to be the sperm of the accused ('the said chemist report'); and (iii) in fixing sentence, the learned SCJ failed to adequately consider the mitigating factors, with the result that the sentence imposed was manifestly excessive.

Held (dismissing appeal; affirming decision of court below):

(1) Even though the complainant's evidence was uncorroborated, the learned SCJ had expressly warned himself of the dangers of convicting the accused based on uncorroborated evidence. The learned SCJ had seen the complainant's demeanour and was of the view that her evidence was credible especially in so far as the fact that the accused had sexual intercourse with her. Unless there was occasioned some miscarriage of justice or there was a good reason, the High Court sitting in its appellate jurisdiction would not normally disturb the findings of the trial judge on the finding of facts and demeanour of witnesses as the trial judge had the benefit and opportunity to observe the witness testifying in open court. (paras 8, 9 & 10)

(2) The omission and/or failure to produce the said chemist report was not fatal. The prosecution acted correctly when they offered the chemist to the defence before closing their case and the accused, having his defence called, opted not to call other witnesses, including the chemist, other than himself. Therefore, the accused was estopped from raising this issue. Even if the court were to draw adverse inference for the failure and/or omission to produce the said chemist report, there was still sufficient evidence to maintain conviction of the accused. The medical report of the complainant formed a piece of corroborative evidence to show that there was penetration into her vagina. (paras 11, 13, 14, 16 & 17)

(3) The SCJ had exercised his discretion properly and correctly and there was no reason for the court to disturb the sentence imposed. In passing the sentence, the learned SCJ had considered the mitigating factors. The sentence imposed by the learned SCJ was fair and appropriate, taking into consideration that the maximum punishment for this offence is 20 years imprisonment and whipping. (paras 21, 22 & 26)

Case(s) referred to:

Brabakaran v. PP [1965] 1 LNS 12 FC ***(refd)***

CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd [2006] 2 CLJ 409 CA ***(refd)***

Ko Poi Tung v. PP [2001] 1 LNS 32 HC ***(dist)***

Lim Kim Poh v. PP [2000] 8 CLJ 328 HC ***(refd)***

PP v. Awangku Shukur Pg Ismail (Case Number KK-42-46-2011) (unreported) ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***
Zulkifli Ismail v. PP [1994] 4 CLJ 450 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Penal Code, s. 376(1)

For the plaintiff - AG's Chambers, State of Sarawak
For the defendant - M/s Saban Sawayan & Co

Reported by Najib Tamby

JUDGMENT

Lee Heng Cheong JC:

Introduction

[1] This is respect of an appeal by Public Prosecutor and a cross appeal by Johnny Jamuyah in respect of the learned Sessions Court Judge's ("the learned SCJ") decision in Kota Kinabalu Sessions Court Criminal Case No. 62-01-2011 (Kota Marudu).

[2] The Public Prosecutor is appealing against the inadequacy of sentence imposed by the learned SCJ.

[3] Johnny Jamuyah is appealing against the said decision of the learned SCJ in convicting him on a charge under s. 376(1) of the Penal Code for rape and sentencing him to eight years' imprisonment and one stroke of whipping.

[4] The charge preferred against the accused was that on 27 March 2011, at about 12.30am at Astaka Padang Bola Sepak, in the District of Kota Marudu, in the State of Sabah, committed an offence of rape on Jasli binti Apat without her consent, who at that time was under the age of 16 years old. This is an offence under s. 376(1) of the Penal Code punishable with the same provision. The accused claimed trial to the charge.

[5] For easy reference, the charge is reproduced as follows:

> Bahawa kamu pada 27.3.2011 pada jam lebih kurang 0030 hours, bertempat di Astaka padang bola sepak, dalam Daerah Kota Marudu, di Negeri Sabah, telah melakukan kesalahan merogol JASLI BINTI APAT, dengan tanpa kerelaannya, pada ketika ia masih berada di bawah umur 16 tahun. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 576 (1) Kanun Keseksaan, jika disabit kesalahan hendaklah diseksa dengan penjara sehingga 20 tahun dan bolehlah juga dikenakan sebat.

[6] The prosecution called seven witnesses to the stand. Having conducted a maximum evaluation to the prosecution's evidence, the learned SCJ called on the accused to enter his defence. The accused called himself as the only witness for the defence. At the end of this case, the learned SCJ found that the prosecution has proven its case beyond reasonable doubt and found the accused guilty as charged and sentenced him accordingly.

Grounds Of Appeal

[7] Johnny Jamuyah's grounds of appeal are *inter alia* as follows:

On Conviction

(a) The learned SCJ erred in law and in fact in calling the appellant/accused to enter his defence as the prosecution had not established a *prima facie* case;

(b) The learned SCJ failed to consider the fact that the prosecution had failed to tender the chemist report of the items seized by the police, ie:

(i) sehelai T shirt mangsa;

(ii) sehelai track suit mangsa;

(iii) sehelai coli mangsa;

(iv) sehelai seluar mangsa;

(v) dua helai rambut;

(vi) dua swab yang di syaki air mani.

(c) The conviction is not safe as there is no corroborative evidence of the complainant's evidence.

(d) The learned SCJ erred in law and in fact and misdirected himself when he failed without reasonable justification to explain why he disbelieved the appellant and his demeanour during his testimony.

On Sentence

(a) The learned SCJ in fixing sentence, had failed to adequately consider all the relevant factors in his favour and had erred in law and fact in finding that there had been little mitigating factors which ought to be considered by the trial court; and

(b) That the sentence imposed was manifestly excessive.

Consideration Of The Grounds Of Appeal

[8] I find that even though the complainant/victim's ("PW1") evidence was uncorroborated, the learned SCJ had expressly warned himself, of the dangers of convicting the accused based on uncorroborated evidence. In the case of *Brabakaran v. PP* [1965] 1 LNS 12, Ong AG CJ (Malaya) speaking from the Bench of the Federal Court held that:

> Corroborative evidence is not necessarily restricted to the oral evidence of an independent witness. Corroboration can equally well be afforded by established facts and the logic of established facts sometimes speaks even more eloquently than words.

[9] The learned SCJ has seen the demeanour of PW1 and was of the view that her evidence was credible especially in so far as the fact that the accused had sexual intercourse with her. The learned SCJ observed that:

> However, having said that, although no challenge was made to the evidence of sexual intercourse and penetration, I have no reason to disbelieve PW1 as in the course of the trial, after scrutinizing the evidence of PW1 carefully and after seeing and hearing her in the witness box, I was left with the impression that she is a credible witness as she demonstrated none of the allegations by the defence that she had set up the accused in order to save her boyfriend Sudin. It must however be noted that although she did not lodge a report against Sudin, I believe her reason for not

A doing so is that she could not remember anything as she was drunk. In any case, Sudin was charged for the same offence and is now serving prison sentence.

[10] The High Court sitting in its appellate jurisdiction normally, B unless there is some miscarriage of justice and good reason, will not disturb the findings of trial judge on the finding of facts and demeanour of witnesses as the trial judge had the benefit and the opportunity to observe the witness testifying in open court. His Lordship Gopal Sri Ram JCA (as he then was) speaking for the C Court of Appeal in the case of *CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd* [2006] 2 CLJ 409, said that:

> When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross examined before the judge, the court is sensible of the 6 great advantages he has had D in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions: and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the E witnesses.

[11] Another issue raised by Johnny Jamuyah, is the failure and/ or omission on the part of the prosecution, to produce the chemist report of the two swabs suspected to be the sperm of the F accused. I find that such an omission and/or failure is not fatal because the chemist was offered as a witness to the defence and the accused was at liberty to call and examine the chemist but he did not do so.

G **[12]** It is trite law that a chemist, in most cases, is an expert called to give his or her expert evidence. It is also a trite law that the court is not bound to accept expert opinion given during trial. Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was) speaking for the Supreme Court in the case of *Wong Swee Chin v. H PP* [1980] 1 LNS 138; [1981] 1 MLJ 212 said that, at pp. 213 and 214:

> In the course of elucidating disputed questions, aids in the form of expert opinions are in appropriate cases placed before juries or judges. But, except on purely scientific issues, expert evidence is I to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments. In the

> ultimate analysis it is the tribunal of fact, whether it be a judge or jury, which is required to weigh all the evidence and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion.

[13] I find that the prosecution has acted correctly when they offered the chemist to the defence before closing their case and the accused, having his defence called, opted not to call other witnesses, including the chemist, other than himself. As rightly decided by the learned SCJ, the calling of witnesses is the discretion of the prosecution. As long as there is no suppression of evidence by the prosecution, s. 114(g) of the Evidence Act 1950 will never be invoked.

[14] In my view, the accused is now be estopped, due to the fact that he opted not to call the chemist as a defence witness after he was offered by the prosecution, from raising this issue.

[15] Reference can be made in the case of *Zulkifli Ismail v. PP* [1994] 4 CLJ 450, whereby Her Ladyship Ranita Hussein JC observed that:

> Adverse inference can only be drawn if there is withholding of evidence but not merely on account of failure to obtain evidence. The non-production of the chemist as a witness can hardly be equated to the non-production of "evidence which could be produced" within the meaning of s. 114(g) Evidence Act 1950. The prosecution has every right to choose who it wishes to call as a prosecution witness. In any case the chemist report was produced and the accused could have called the chemist as his own witness if he wanted to. In the circumstances no adverse inference can be drawn by the failure of the prosecution to produce the chemist.

[16] Furthermore even if I were to draw an adverse inference for the failure and/or omission to produce the said chemist report of the two swabs suspected to be sperm of the accused and find that the chemist report of the two swabs suspected to be the sperm of the accused, belonged to third parties other than the accused, I find that there is still sufficient evidence to maintain the conviction of the accused.

[17] Moreover, I find that the medical report (exh. P8) which, upon perineal examination, revealed complete old hymenal tear at 7 o'clock position and partial old hymenal tear at 1 and 3 o'clock

positions. This in my opinion formed a piece of corroborative evidence to show that there was penetration into the complainant's vagina.

[18] I am guided by the case of *Zulkifli Ismail v. PP*, *supra*, whereby the learned Judicial Commissioner said that:

> In this connection practical guidance may be obtained from the case of *Emperor v. Mahadeo Tatya* AIR (29) 1942 Bombay 121 which established that: Where rape is denied by the accused the sort of corroboration one looks for is medical evidence showing injury to the private parts of the complainant, injury to other parts of her body which may have been occasioned in a struggle, seminal stains on her clothes or the clothes of the accused or the places where the offence is alleged to have been committed; and in all cases importance is attached to the subsequent conduct of the complainant.

[19] As regards the case of *Ko Poi Tung v. PP* [2001] 1 LNS 32 referred to by the learned counsel for Johnny Jamuyah, I find that this case is distinguishable from the present appeal, as in that case, Ian HC Chin J held as follows:

> As for the girl's testimony, it was obvious that she had trouble with stating the very simple thing in life like one's age. One may make mistake or be unable to recall correctly one's age but to say one is 5 years old when one is 15 years old is testimony of the mental subnormality which the doctor said of her.

In the present appeal, there is no evidence to show that PW1 is of mental subnormality. She was, at the time of the commission of the offence, a secondary school student with normal mentality and the learned SCJ has found that her testimony was credible.

[20] In the premises, I dismiss Johnny Jamuyah's appeal against his conviction.

Johhny Jamuyah's Appeal Against Sentence

[21] As regards to the accused's appeal against the sentence imposed by the learned SCJ, I find that the lower court had exercised its discretion properly and correctly and I find no reason to disturb the sentence imposed.

[22] I find that the learned SCJ before passing the sentence, had observed and considered several factors *viz*:

(a) That this is the accused first offence and he is now married with two children.

(b) By claiming trial, he is not remorseful of the offence which he had committed.

(c) From the evidence adduced in this case the accused invited the victim for an outing but instead he had some other motive in mind.

(d) He forced her to have sex and in the process close her mouth so that she could not scream and asked for help. He also told her not to tell anybody about the incident or else he will expose what transpired between them.

(e) Offence of rape is serious as reflected in the punishment provided for in this type of offence.

[23] Even though the learned SCJ did not specifically mention that the public interest is the paramount consideration in passing sentence, but at the last paragraph of his judgment, he did mention that the offence is serious as reflected in the punishment provided for this offence, which only shows that the real intention of legislature that public interest demands it.

[24] His Lordship Kang Hwee Gee (as he then was) speaking from the Bench of the High Court Shah Alam in the case of *Lim Kim Poh v. PP* [2000] 8 CLJ 328 said that:

> It is the established principle that an appellate court should be slow to interfere or disturb a sentence passed by a court below unless it is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. The mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence. (*PP v. Mohamed Nor & Ors* [1985] 2 MLJ 200. See also *Bhandulananda Jayatilake v. PP* [1982] 1 MLJ 83 (FC)). He further said that: An appellate court will not interfere unless it is satisfied that (i) the sentencing judge has made the wrong decision as to the proper factual basis for sentence; (ii) the sentencing judge has erred in appreciating the materials placed

A before him; (iii) the sentencing judge has passed a sentence which is wrong in principle; and (iv) the sentencing judge has imposed a sentence which is manifestly excessive. *Tan Koon Swan v. PP* [1987] 1 CLJ 511.

B **[25]** Also I am guided by what his Lordship David Wong Dak Wah speaking for the High Court of Kota Kinabalu in a recent case of *Pendakwa Raya v. Awangku Shukur Pg Ismail* (Case Number KK-42-46-2011) (unreported) held that:

C I come now to the cross appeal by the prosecution in respect of sentence. The law on such appeal is settled and that is sentences passed by the lower court should not be interfered with merely because the presiding Judge in the higher court might have passed a different sentence. The only circumstances which the appellate court should interfere is when the lower court had been manifestly wrong in that he or she had taken into irrelevant considerations

D into passing sentence. That is not the case here. The learned Sessions Court Judge had not taken into irrelevant considerations and this can be seen in both page 61 and page 62 of the Records of Appeal. In the circumstances the cross appeal by the prosecution is dismissed as well.

E **[26]** In the circumstances of this case, I find that the sentence imposed by the learned SCJ, of eight years imprisonment from the date of conviction and one stroke of the whipping, fair and appropriate, taking into consideration that the maximum

F punishment for this offence is 20 years imprisonment and whipping. For the reasons above, I dismiss this appeal against sentence by Johnny Jamuyah.

The Public Prosecutor's Appeal

G **[27]** As regards the cross appeal by the prosecution against inadequacy of sentence, I dismiss this cross appeal for the reasons stated in paras. 21 to 26 above.

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